In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-870

FRED ARNOLD CLEMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial with others in the United States District Court for the Middle District of Tennessee, petitioner was convicted on three counts of having possessed and transferred counterfeit Federal Reserve Notes, and of conspiring to commit the substantive offenses, in violation of 18 U.S.C. 472, 473, and 371. He was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. B).

Petitioner was arrested on January 10, 1970. He and others were indicted on February 12, 1970, and arraigned on March 11, 1970. Two of petitioner's co-

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defendants thereafter filed motions for a speedy trial on November 9, 1970, and September 15, 1971, respectively. On November 10, 1971, the case was set for trial on December 16, 1971. Trial was held on that date after the court denied motions by all the defendants to dismiss for lack of a speedy trial (Pet. App. A). The government requested no continuances and petitioner at no time moved to have the case set for trial. We are advised—and petitioner does not dispute (see Pet. 4)—that the delay between indictment and trial resulted primarily from congestion of the court calendar, although petitioner's co-defendants did make pretrial motions for suppression of evidence and for discovery which accounted for some of the delay.

Petitioner's sole contention is that the 23-month period between his arrest and the date of trial constituted a denial of his right to a speedy trial, in violation of the Sixth Amendment. The court of appeals, however, correctly applied *Barker* v. *Wingo*, 407 U.S. 514, in rejecting this contention. This Court in *Barker* adopted a four-point balancing test for determining whether a defendant has been deprived of his right to a speedy trial. The test takes into account the conduct of both the prosecution and the defense with respect to the length of the delay, the reason therefor, the defendant's assertion of his right, and the prejudice resulting from the delay (407 U.S. at 530). Applying that test to the facts of this case, we note that the 23-month period complained of is less than half the delay in *Barker*, that the delay was caused by

court congestion and not by prosecution tactics,[1] that petitioner never asserted his right to a speedy trial, and that no prejudice to the preparation of a defense is alleged to have resulted. Petitioner was, moreover, at liberty on bond throughout the pretrial period.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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[1] This Court observed in *Barker* that "different weights should be assigned to different reasons" and that a "more neutral reason such as * * * overcrowded courts should be weighed less heavily" than a "deliberate attempt [by the prosecution] to delay the trial in order to hamper the defense" (407 U.S. at 531).

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